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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-1316

JAMES RUSSELL SWINNEY, III, individually and on behalf of a class of persons known as the Civil Service Employees of Escambia County, Florida,

Petitioner,

vs.

ROYAL J. UNTREINER, Sheriff of Escambia County, Florida; WILLIAM M. CHISOLM, WILLIAM G. CHAMPLIN, I. S. POWELL, J. L. TAYLOR, and TED CIANO, as members of the Civil Service Board of Escambia County, Florida; and CARL H. HARPER, County Solicitor of Escambia County, Florida,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT L. SHEVIN
ATTORNEY GENERAL

SCOTT R. NABORS
ASSISTANT ATTORNEY GENERAL

Counsel for Respondents

Department of Legal Affairs
Civil Division
222 West Pensacola Street
Tallahassee, Florida 32304

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IN THE

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JAMES RUSSELL SWINNEY, III, individually and on behalf of a class of persons known as the Civil Service Employees of Escambia County, Florida,

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Petitioner for Writ of Certiorari to the Florida Supreme Court seeks review of the Opinion upholding the validity of §23, Chapter 67-1370, Laws of Florida, which is reported as Swinney v. Untreiner,

272 So.2d 805 (Fla. 1973), a copy of which is affixed to Petitioner's Brief as Exhibit 5 of the Appendix (pp. A-55-A-69). The Opinion of the Circuit Court is not reported but may be found in the Petitioner's Brief as Exhibit 3 of the Appendix.

JURISDICTION

Respondents challenge Petitioner's contention that jurisdictional prerequisites under 28 U.S.C. 1257(3) have been satisfied for the reasons set forth in the arguments opposing the Petition for Writ of Certiorari to the Florida Supreme Court.

STATEMENT OF THE CASE

In May, 1972, the Petitioner, James L. Swinney, III, Deputy Sheriff, individually and on behalf of a class of persons including nineteen other Deputy Sheriffs known as the Civil Service Employees of Escambia County, Florida, filed a civil complaint against the Sheriff, County Solicitor, and the Escambia County Civil Service Board, seeking declaratory and injunctive relief to prevent the Respondents from taking any criminal or civil action against the civil service employees for activities prohibited by §23 of Chapter 67-1370, Laws of Florida 1967, the Civil Service Act for Escambia County, Florida. The Petitioner alleged, inter alia, that the prohibitions of §23 were vague, overbroad, and inconsistent with

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the guarantees of equal protection and due process afforded by the First, Fifth, and Fourteenth Amendments to the United States Constitution. The Petitioner attacked express prohibitions found in §23 against seeking elective public office, taking an active part in political campaigns, serving as a member of a political club, seeking signatures and circulating petitions concerning elections, and distributing badges, colors, or indicia favoring or opposing a particular candidate for election.

Attached to the Complaint filed by the Petitioner were twenty affidavits by the civil service employees announcing their desire to participate actively in the Petitioner's or other candidates' campaigns, but for the fear of criminal or civil penalty for violation of §23. If the affiants were, indeed, threatened by criminal prosecution for violation of §23, that threat was eliminated on July 17, 1972, by the trial court's conclusion that §18 of the Escambia County Civil Service Act did not pass federal or state constitutional muster.

At this juncture it should be noted that Petitioner's conclusion, set forth in the Statement of Facts[1], that certain political activities, i.e., serving as a delegate to a political convention, making speeches and preparing resolutions, organizing and addressing political rallies,

[1]See, e.g., pp. 4,5 in the Petition for a Writ of Certiorari to the Florida Supreme Court.

becoming a member of political clubs, wearing badges, publishing, managing or editing partisan newspapers, writing articles or letters to non-partisan newspapers, and organizing or participating in political parades, are included in §23 prohibitions is unfounded. Neither the Florida Supreme Court opinion nor the trial court's order upholding the constitutionality of §23 support such a construction. The unfounded conclusion is erroneous, at least in part, because §23 expressly provides that nothing in the civil service act should be construed to prohibit employees from being members of political clubs or organizations, or from attending political meetings. §23, Chapter 67-1370, Laws of Florida 1967.

On July 19, 1972, the trial court upheld the constitutionality of §23, and thereafter, the Sheriff of Escambia County suspended Petitioner for seeking an elective position in the Florida House of Representatives. Following affirmance of the trial court's order by the Florida Supreme Court on January 22, 1973, the Escambia County Civil Service Board dismissed the Petitioner.

The Petitioner now seeks a Writ of Certiorari to the Florida Supreme Court, contending that §23, Chapter 67-1370 of the Laws of Florida, 1967, violates the First, Fifth and Fourteenth Amendments of the United States Constitution, and effects an unlawful restraint on political freedom within the meaning of Sweezy v. New Hampshire, 354 U.S. 234, 1 L.Ed. 2d 1311, 77 S.Ct. 1203 (1957).

QUESTIONS PRESENTED

I

WHETHER §23, CHAPTER 67-1370, LAWS OF FLORIDA 1967, AN ACT ESTABLISHING THE ESCAMBIA COUNTY CIVIL SERVICE SYSTEM, VIOLATES THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II

WHETHER THE ACTIONS OF THE ESCAMBIA COUNTY CIVIL SERVICE BOARD HAVE A CHILLING EFFECT UPON FREEDOM OF SPEECH AND ASSOCIATION AND CONSTITUTE AN UNLAWFUL RESTRAINT UPON POLITICAL FREEDOM WITHIN THE MEANING OF SWEEZY V. NEW HAMPSHIRE, 354 U.S. 234, 1 L.ED. 2D 1311, 77 S.CT. 1203 (1957).

STATUTE INVOLVED

Section 4. Duties.

The duties of the civil service board shall be as follows:

(b) To make investigations concerning the enforcement and effect of this act and any violations thereof; to require and enforce observance of its provisions and of the lawful rules and regulations made thereunder; and to punish by suspension

for not more than thirty (30) days without pay or by dismissal from service any employee found, after due notice and hearing, guilty of any violation of any of the provisions of this act or of any of said rules and regulations or of any lawful order or direction which it may be his duty to comply with or obey.

(c) To hear and determine appeals or complaints respecting the administration of this act.

Section 23. Elective office or political activity.

No person holding an office or place in the classified service under the provisions of this act shall seek elective public office, or serve in any elective or appointive position in any political party, or take an active part in any political campaign, or serve as an officer or a member of a committee of any political club or organization, or circulate or seek signatures to any petition provided for in any primary or election law or act as a worker at the polls, or distribute badges, colors, or indicia favoring or opposing a candidate for election or nomination to a federal, state, county or municipal public office, provided, however, that nothing in this act shall be construed to prohibit or prevent any such officer or employee from becoming or continuing to be a member of a political

club or organization, or from attendance upon political meetings, or from enjoying entire freedom from all interference in casting his vote.

Any person violating the provisions of this section shall be dismissed from the service of the county.

67-1370, Laws of Florida.

ARGUMENT

Petitioner, James Russell Swinney, III, who was dismissed by the Escambia County Civil Service Board for his partisan political activity, and twenty additional civil service employees, challenge the validity of the Escambia County Civil Service Act considered by the Florida Supreme Court in its opinion below. Swinney v. Untreiner, 272 So.2d 805 (Fla. 1973).

The United States Supreme Court heard argument challenging a similar statute in the case of Broadrick v. Oklahoma State Personnel Board, Docket No. 71-1639, reported at 41 U.S.L.W. 3522 (U.S. Apr. 3, 1973). Because the Supreme Court Opinion in Broadrick will settle conflicting opinions among the various lower courts, the Respondents respectfully request that the disposition of the instant cause be stayed until the Supreme Court Opinion in Broadrick, supra, is rendered. If the Petition for Writ of Certiorari be granted, the Respondents request that the cause be

remanded to the Florida Supreme Court for consideration in light of Broadrick, supra. See Henry v. City of Rock Hill, 376 U.S. 776, 12 L.Ed. 2d 79, 84 S.Ct. 1042 (1964); Winkle v. Bannan, 368 U.S. 34; 7 L.Ed. 2d 71; 82 S.Ct. 146 (1961).

Alternatively, the Respondents seek denial of the Petition for Writ of Certiorari for the following reasons.

Despite counsel for Petitioner's attempt to engender a "chilling effect" from a patently constitutional state statute by clouding the facts to which it was applied, the Florida Supreme Court correctly upheld the constitutional validity of §23, prohibiting certain types of political activity by the civil service employees of Escambia County, Florida. Because the Florida Supreme Court's opinion rests on adequate and independent state grounds that are compatible with guarantees of equal protection and due process afforded by the First, Fifth, and Fourteenth Amendments to the United States Constitution, review of the Opinion below should be denied.

The adequate and independent state grounds upon which the opinion below rests consist of the state interest in an orderly, fair and efficient administration of the Escambia County Civil Service Act. §1, Chapter 67-1370, Laws of Florida. The prohibitions against certain political activity found in §23 of the Civil Service Act are intended to protect that interest by limiting conflicts between political

party objectives and governmental departmental needs. United Public Workers of America v. Mitchell, 330 U.S. 75, 91 L.Ed. 754, 67 S.Ct. 556 (1947). By reducing political influence for certain classified employees, the Escambia County Civil Service Board operates on a merit basis, increasing the quality of public service. Moreover, the individual employee is protected from coercion into campaigning and similar political activities both on and off duty that would be a necessary evil without the prohibitions of §23.

Especially where a compelling state interest is involved, such as the fair, efficient administration of the Escambia County Civil Service System, a state court construction of a state statute should prevail, regardless of the co-existence of federal constitutional issues. The state court should be entrusted to achieve a balance between the state interest and possible constitutional infringement, for it was never the United States Supreme Court's purpose to construe state statutes, especially on substantive issues. U. S. v. Thirty Seven (37) Photographs, 402 U.S. 368, 28 L.Ed. 2d 822, 91 S.Ct. 1400, rehearing den., 409 U.S. 924, 29 L.Ed. 2d 702, 91 S.Ct. 2221 (Calif. 1971).

To secure the integrity of the federal system, the Florida Supreme Court's interpretation of the state law challenged by the Petitioner should not be questioned, for Article III of the United States Constitution carefully prescribes the extent of federal question jurisdiction to cases

arising under the Constitution, Statutes, and Treaties of the United States. U. S. CONST. art. III, §2. Although review of the highest state court opinion is provided by 28 U.S.C. 1257(3), where the validity of a state statute is drawn in question on the ground of its being repugnant to the United States Constitution, this jurisdictional statute should be strictly construed to be consistent with Article III, U. S. CONST. art. III, §2.

Although Petitioner couched his petition in terms of the "chilling effect" and other catchwords from Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed. 2d 22, 85 U.S.Ct. 1116 (1965), Petitioner apparently did not recognize the several reasons why Dombrowski is inapposite here. The divided Dombrowski Court considered the overbreadth doctrine in connection with impending criminal prosecution. In the case at bar, that threat, real or imagined, was eliminated by the trial court's order finding the criminal sanction for violation of §23 unconstitutional. Moreover, the Dombrowski Court did not overturn the requirement of earlier cases that a statute must not only be overbroad on its face, but also vague in its applications to be overturned on constitutional grounds. Since Younger v. Harris, 401 U.S. 37, 27 L.Ed. 2d 669, 91 S.Ct. 746 (1971), has significantly limited the Dombrowski rationale, Petitioner sought relief for himself and his fellow employees through an antiquated legal theory.

In attacking the constitutional validity of §23, Petitioner represents twenty other public employees whose affidavits in the record for review assert their desire to participate in certain political activity,

but for the prohibitions of §23. Despite the attempt to show §23 exerted a "chilling effect," however, the Petitioner has failed to allege essential facts that would demonstrate that the civil service employees have standing to challenge the constitutionality of §23.

Apparently relying on Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed. 2d 22, 85 S.Ct. 1116 (1965), the affiants asserted in their affidavits that they were "afraid" of prosecution or dismissal for engaging in conduct that was clearly proscribed by §23. However, the affiants do not allege that an investigation to enforce the Civil Service Act had been instigated as provided by §4 (b), or that prosecution or dismissal was likely or even remotely possible for the political activity they had planned.

In Younger v. Harris, 401 U.S. 37, 27 L.Ed. 2d 669, 91 S.Ct. 746 (1967), the Supreme Court considered a similar situation wherein the Defendant Harris challenged a statute for its "chilling effect" on First Amendment rights. Three other Petitioners joined Harris in his challenge, but neither had been indicted, arrested, or threatened with prosecution. Due to the absence of allegations that they would be prosecuted and the lack of "live" controversy, the United States Supreme Court dismissed the three Petitioners who had joined Harris in his cause. To achieve consistent application of the Younger v. Harris rationale, the twenty Petitioners who joined Petitioner Swinney's Complaint should be dismissed and the Writ of

Certiorari considered, if at all, only on behalf of the Petitioner Swinney. Younger v. Harris, supra.

In view of counsel for Petitioner's attempt to engender a "chilling effect" for §23, the fact that the Petitioner and the civil service employees neglected to exhaust their administrative remedies before seeking declaratory or injunctive relief is particularly significant. Such a remedy is provided by §4(c) of Chapter 67-1370 of the Laws of Florida, requiring the civil service board to hear and determine appeals or complaints respecting the administration of the act. The affiants' and Petitioner's neglect should be fatal to a finding that the Petitioner presented a justiciable case or controversy.

In his Petition for Certiorari, the Petitioner critizes the Supreme Court's deference to legislative intent in Mitchell, supra, wherein the Hatch Act, which restricted certain political privileges of federal civil service employees, was challenged. However, the Supreme Court's deference is especially appropriate when personal political privileges are proscribed since such privileges defy statutory definition. Much better than a complex statute specifically delineating countless types of prohibited activity is a general statute in which the underlying intent is evident, enabling a case by case adjudication of proscribed activity.

The Hatch Act construed in Mitchell, supra, dealt with a much more general prohibition against political activity than the

prohibitions in §23. The Hatch Act refers to a backlog of Civil Service Commission rules and regulations in proscribing certain political activities, whereas the Escambia County Civil Service Act contains a clear, concise prohibition of a limited type of political activity.

A comparison of §23 of the Escambia County Civil Service Act, the Hatch Act, and the Oklahoma Civil Service Act now before the court in Broadrick, supra, reveals that the Escambia County Civil Service Act is least restrictive and more precise than either of the two acts presently undergoing constitutional attack before the United States Supreme Court, so that it is properly distinguishable from the constitutional shortcomings, if any, of the Hatch or Oklahoma Act.

In order to protect the state's interest in promoting the fairness and efficiency of the Escambia County Civil Service Board and to avoid political influence to the detriment of efficient civil service in general and of law enforcement in Escambia County in particular, the Respondents strenously oppose the Petitioner's prayer for a Writ of Certiorari.

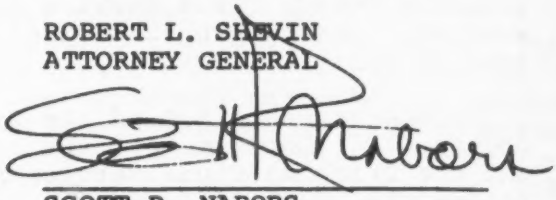
CONCLUSION

It is respectfully requested that the Petition for Writ of Certiorari to the Florida Supreme Court be denied; but if granted, it is suggested that the opinion of the Florida Supreme Court be vacated

and the cause remanded to the Florida Supreme Court for further proceedings.

Respectfully submitted,

ROBERT L. SHEVIN
ATTORNEY GENERAL



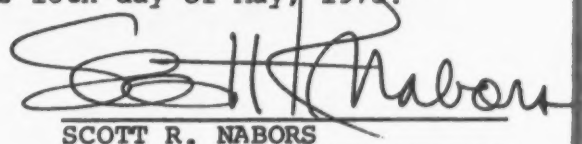
SCOTT R. NABORS
ASSISTANT ATTORNEY GENERAL

Counsel for Respondents

Department of Legal Affairs
Civil Division
222 West Pensacola Street
Tallahassee, Florida 32304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I forwarded for filing this date forty (40) copies of this printed Brief for Respondents in Opposition with the Clerk, United States Supreme Court, by U.S. Mail and that I served upon Paul Shimek, Jr., Esquire, 517 North Baylen Street, Pensacola, Florida; Hobart O. Worley, Jr., Esquire, 334 Brent Building, Pensacola, Florida 32501; and R. H. Merritt, Esquire, 105 Lawyers Building, 314 South Baylen Street, Pensacola, Florida 32501, three copies each by mailing same to them, first class postage prepaid, in accordance with Rule 33, Supreme Court Rules. I further certify that all parties required to be served have been served on this 16th day of May, 1973.



SCOTT R. NABORS
ASSISTANT ATTORNEY GENERAL